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No. 90-1791

In The

Supreme Court Of The United States

October Term, 1990

THE CONNECTICUT NATIONAL BANK,

Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. ARGUMENT

In responding to CNB's petition for a writ of certiorari, the Trustee erroneously contends that there are no special reasons for this Court to review the decision rendered below by the Court of Appeals for the Second Circuit. To support his claim, the Trustee argues, first, that there is only minimal confusion amounting to minor disagreement among the courts of appeals on the issue of the appealability of interlocutory orders in bankruptcy matters; second, that there is no disharmony between competing precedents within the Second Circuit; third, that the issue is unimportant; fourth, that the decision below was well-reasoned; and fifth, that the decision is in harmony with applicable decisions of the Supreme Court.

In arguing minor "confusion" among the courts of appeals, the Trustee apparently ignores the recent conclusion of the Fourth Circuit that the courts of appeals "are badly split" on the issue of the applicability of § 1292(b) to appeals of interlocutory bankruptcy orders. *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 751-52 (4th Cir. 1990). The Trustee also apparently ignores the conclusion reached by the court below which noted that "[t]he disarray of our decisions is matched by similar disagreements among the circuits, which are amply described in *Capitol Credit* . . . . " *Germain v. The Connecticut National Bank*, 926 F.2d 191, 194 (2d Cir. 1991). *See In re Benny*, 791 F.2d 712, 717 (9th Cir. 1986) (noting similar disarray in the precedents of the Ninth Circuit). Since the Fourth Circuit's decision in the *Capitol Credit* case in 1990, this well-recognized split has only deepened.[1]

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[1] For example, in addition to the precedents discussed in *Capitol Credit*, the Second Circuit has rendered its opinion in the case below in conflict with *In re Goodman*, 873 F.2d 598, 602 (2d Cir. 1989) (finding an order of a bankruptcy judge appealable pursuant to § 1292(a)(1)); the Seventh Circuit has followed its prior precedents permitting interlocutory appeals of

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The Second Circuit's holding that it lacked jurisdiction under § 1292(b) to hear interlocutory appeals of matters originating in the bankruptcy courts is bottomed on its determination that § 158(d) is an exclusive jurisdictional grant. *Germain*, 926 F.2d at 191 & 194. *Accord LTV Corp. v. Farragher (In re Chateaugay Corp.)*, 838 F.2d 59, 62-63 (2d Cir. 1988) (holding § 158(d) to be exclusive). In attempting to characterize the current nationwide split of authority on the exclusivity of § 158(d) as relatively minor, the Trustee attempts to limit the focus of attention to those particular cases where a court of appeals has specifically accepted or denied a petition for review under § 1292(b). *Respondent's Brief*, at 12. Thus, the Trustee seeks to exclude from consideration those cases that deal mainly with whether § 158(d) precludes application of other jurisdictional provisions, such as §§ 1292(a) and 1291. A clear split of authority does exist on the narrow issue of whether § 158(d) precludes § 1292(b) in the limited sense suggested by the Trustee. *Compare, e.g. Germain*, 926 F.2d at 197 (rejecting applicability of § 1292(b)); *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d at 754 (rejecting applicability of § 1292(b)), with *In re Jartran, Inc.*, 886 F.2d 859, 864-65 (7th Cir. 1989) (applying § 1292(b)); *In re Moens*, 800 F.2d 173, 176-77 (7th Cir. 1986) (applying § 1292 (b)). However, consideration of these precedents alone is overly narrow. The relevant issue of the exclusivity of § 158(d) for jurisdictional purposes is the same regardless of whether a specific court is construing § 158(d) in conjunction with § 1292(b), § 1292(a) or § 1291 – either § 158(d) precludes application of other jurisdictional provisions or it does not. Thus, in concluding that § 158(d) was exclusive, the court below stated with regard to §§ 1292(b) and 1292(a) that "we perceive no principled grounds for distinguishing between these subsections for purposes of determining our appellate jurisdiction." *Germain*, 926 F.2d at 193. Other courts have treated the issue

[1] *(continued)*
bankruptcy orders in bankruptcy cases, *Levit v. Ingersoll Rand Financial Corp. (In re V.N. Deprizio Construction Co.)* 874 F.2d 1186, 1188 (7th Cir. 1989); and the Tenth Circuit has rejected the approach taken by the Seventh Circuit, *In re Kaiser Steel Corp.*, 911 F.2d 380, 386 (10th Cir. 1990).

of exclusivity in the same collective manner. *See, e.g., In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985) (after finding § 158 to be exclusive, the court stated "[w]e conclude that the interlocutory appeal provisions of § 1292, like the final appeal provisions of § 1291, are inapplicable to bankruptcy proceedings"); *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (concluding that § 158 "clearly supersedes 28 U.S.C. § 1291 . . . and would inferentially appear to supersede § 1292 as well"). Accordingly, in discussing the disagreements among the circuits, CNB has included a fuller sampling of the conflicting decisions that treat the exclusivity of § 158(d). *See Petitioner's Petition for a Writ of Certiorari*, at 5-6 (discussing the three schools of thought on the exclusivity of § 158(d)).

Viewed in full perspective, the marked disagreements over the exclusivity of § 158(d) is an example of confusion and conflict of the worse kind. The present unsatisfactory state of affairs is perhaps best illustrated by the amount of disagreement among various panels within the same circuits. Not only do different panels disagree on their jurisdiction over bankruptcy orders under § 1292(b) in conjunction with § 158(d), but they also disagree on the applicability of §§ 1292(a) and 1291.[2] In its own candid assessment, the court below acknowledged that appellate precedents within the Second Circuit "are in disarray on the jurisdictional question" and recited the con-

[2] *Compare, e.g., In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (holding § 158(d) "clearly supersedes 28 U.S.C. § 1291"), *with In re Texas Research, Inc.*, 862 F.2d 1161, 1162 (5th Cir. 1989) (finding jurisdiction over bankruptcy court order pursuant to § 1291); *Matter of Topco, Inc.*, 894 F.2d 727, 737 (5th Cir. 1990) (concluding "[b]oth Section 1291 and Section 158 govern appeals to courts of appeals from district court decisions when district courts sit as bankruptcy appellate courts"). *Compare, e.g., Germain*, 926 F.2d at 197 (holding § 158(d) to be exclusive), *with In re Goodman*, 873 F.2d 598, 602 (2d Cir. 1989) (finding an order of a bankruptcy judge appealable pursuant to § 1292(a)(1)). *Compare Teton Exploration Drilling, Inc. v. Bokum Resources Corp.*, 818 F.2d 1521, 1524 n.2 (10th Cir. 1987) ("we perceive no indication that Congress intended § 158(d) to act as a limitation on the general jurisdiction of appellate courts under § 1291"), *with In re Kaiser Steel Corp.*, 911 F.2d at 386 (10th Cir. 1990) ("[w] find that Congress must have intended section 158(d) to be the exclusive basis of appellate jurisdiction . . .").

flicts in some detail in the text of its opinion. *Germain*, 926 F.2d at 193-94. Notwithstanding the Trustee's downplaying of the disagreements among and within the circuits, there is virtually no hope that the sharp conflicts of authority can be resolved judicially without the intervention of this Court.

Although the Trustee denies the importance of the issue presented for review, its true significance cannot be seriously in doubt. Not only does the decision of the Second Circuit impact on the jurisdiction of the courts of appeals, but also on the jurisdiction of this Court.[3] Furthermore, this Court thought a similar issue significant enough to warrant certiorari in *Tidewater Oil Co. v. United States, cert. granted*, 405 U.S. 986 (1972), to review whether § 2 of the Expediting Act, 15 U.S.C. § 29, precluded appellate jurisdiction over interlocutory appeals under § 1292(b). In contrast to a decision of the Seventh Circuit,[4] the Court of Appeals for the Ninth Circuit in the *Tidewater* matter found that § 29 barred application of § 1292(b). In discussing the importance of the issue, this Court explained "[b]ecause this decision raises an important question of federal appellate jurisdiction and because a conflict among the circuits subsequently developed on this question, we granted certiorari." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 153 (1972).

Although the Trustee claims that the opinion below is well-reasoned and supported, a conclusion contested by CNB, this argument bears more on whether the decision should be upheld or overturned than on whether the issue presented is significant or important enough for this Court to decide. In

[3] As noted in the decision below, if § 158(d) "precludes court of appeals review of interlocutory decisions of bankruptcy courts, including injunctions, Supreme Court review also will be barred." *Germain*, 926 F.2d at 196. *See also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983) (noting that a finding that § 158(d) excludes § 1292 would "bar all court of appeals and Supreme Court review of interlocutory orders in bankruptcy cases . . .").

[4] *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1244-48 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972).

any event, given the importance of the issue and the sharp disagreements among and within the courts of appeals, the matter merits this Court's review and resolution.

Contrary to the Trustee's assertions, the decision below was decided in a manner at odds with applicable precedents of this Court. A plain, literal reading of § 1292(b) can only result in the conclusion that it is available to appeals of interlocutory district court orders reviewing bankruptcy court orders because the statutory provision is applicable on its face and because nothing in the text of either § 158(d) or § 1292(b) provides that § 158(d) is exclusive. As stated by this Court, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). In this matter, there is nothing in the legislative history that demonstrates that application of § 1292(b) would contradict congressional intent with regard to § 158(d). Accordingly, literal application of both statutes is required. *Id.*

Although the decision below does trace the legislative history of § 158(d) through its predecessor, 28 U.S.C. § 1293, the most that can be concluded from the court's analysis is that it remains unknown whether Congress intended § 158(d) to be exclusive. *See Germain*, 926 F.2d at 194-96 (reviewing legislative history of § 1293). Both the Seventh and Third Circuits have stated that the legislative history is silent on the issue of Congress' intent with regard to any claim of exclusivity. *See in re Moens*, 800 F.2d 173, 177 (7th Cir. 1986) (stating "there is nothing in [§ 158(d)] or its legislative history which indicates that Congress intended to foreclose . . . review [under § 1292(b)]") *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983) (stating "for all practical purposes there is no legislative history for [§ 1293, the predecessor to § 158(d)]"). *See also Teton Exploration Drilling, Inc. v. Bokum Resources Corp.*, 818 F.2d 1521, 1524 n.2 (10th Cir. 1987) ("we perceive no indication that Congress intended § 158(d) to act as a limitation on the gen-

eral jurisdiction of appellate courts under § 1291").

Nonetheless, the court below reached the conclusion that § 158(d) implicitly "repeals" § 1292 as "part of a far greater explicit repeal," presumably of § 1291. *Germain*, 926 F.2d at 197. The court acknowledged that such an interpretation may well violate "the canon of construction disfavoring repeals by implication." *Id.*, at 197. Indeed, in the absence of a "clear and manifest" legislative intent to repeal § 1292, which intent is lacking here, the court's approach would appear to squarely contradict the rule prohibiting implicit repeals. *See, e.g., Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (requiring a "clear and manifest" legislative intent to repeal to support an implicit repeal); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (requiring a clear congressional intent to repeal); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (requiring a clear and manifest intent to support implicit repeal). Nevertheless, the court found the concept of concurrent applicability more troublesome than the prospect of an implicit repeal. *Germain*, 926 F.2d at 197. Other courts, however, have had little difficulty concluding that the several jurisdictional provisions are capable of concurrent application. *See, e.g., In re Pacific Express, Inc.*, 780 F.2d 1482, 1484 (9th Cir. 1986) (finding jurisdiction of bankruptcy court appeal under both § 158 and § 1291); *In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986) (treating §§ 158 and 1291 as alternative jurisdictional provisions); *Teton Exploration Drilling, Inc.*, 818 F.2d at 1524 n.2 (10th Cir. 1987) (finding jurisdiction of appeal from bankruptcy judge under § 1291).

Furthermore, the court below included § 1292 within the sweep of its implicit repeal analysis without elaborating why its concept of a "far greater explicit repeal" of § 1291 necessitated repeal of § 1292. *Germain*, 926 F.2d at 197. Although the court suggests that concurrent application of §§ 158(d) and 1291 would necessarily render one of the provisions superfluous in the context of bankruptcy appeals, *Id.*, the same cannot be said for concurrent application of §§ 158(d) and 1292 since the former treats final orders and the later interlocutory ones. In the absence of an adequate explanation, the court's decision contradicts the rule that statutes capable of coexistence are to each be given effect wherever possible. *See Radzanower v. Touche Ross & Co.*, 426 U.S. at 155; *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"); *United States v. Borden Co.*, 308 U.S. at 198 ("[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible").

The decision below also raises more difficult questions of appellate jurisdiction than it attempts to resolve. To begin with, the court's theory of the implied exclusivity of § 158(d) raises a serious concern over the scope of § 1291. Like § 1291, § 158(d) expressly provides only for review in the courts of appeals of final decisions of the district courts. Neither provision expressly references § 1292(b) nor does either expressly exclude it. If § 158(d) can be said to preclude application of § 1292(b) because § 158(d) only permits appeals of final orders, then, logically, § 1291 also precludes application of § 1292(b) since it also only provides for review of final orders. If § 158(d) is somehow exclusive in a manner that § 1291 is not, the court below does not articulate why in a manner consistent with well-recognized principles of statutory construction.[5] Furthermore, if § 158(d) is genuinely exclusive, then it would also arguably preclude appellate review on writs of mandamus.[6] Again, if the court's concept of exclusivity does not go quite

[5] No significance can be drawn from the codification of § 1291 proximate to 1292 since § 158(d) is the successor to § 1293, a companion to these provisions. The court below acknowledges that § 158(d) differs "in language but not in substance" with § 1293. *Germain*, 926 F.2d at 194.

[6] Arguably, if § 158(d) is as exclusive as some courts adamantly hold, then § 158(d) would appear to preclude review under the All Writs Act, 28 U.S.C. § 1651, including petitions for writs of mandamus. *Compare In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (after concluding that § 158(d) excluded

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so far, there is no limiting principle suggested in the opinion below.

II. CONCLUSION

For the foregoing reasons, the Trustee's arguments should be rejected, and it is respectfully requested that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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September 19, 1991

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[6] *(continued)*
§ 1292, court granted writ of mandamus without treating question of whether exclusivity of § 158(d) extended to the All Writs Act), *with In re Kaiser Steel Corp.*, 911 F.2d at 386 (concluding that "the appellate nature of mandamus subjects it to the same limitations under § 158(d) as exist on our review of a district court's appellate decision under section 158(a)").